SUBJECT INDEX.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 655

ARCHIE FINCH AND NANCY FINCH,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE.

Petitioners contend that they were denied that reasonably adequate representation by counsel which is of the essence of due process of law. To this end they ask this court to review the record of their trial and conviction,

"not" (in the language of their counsel at page 13 of petitioners' brief) "that this Court should exercise its discretionary power and take jurisdiction of this case in order to determine or resolve any of the specific questions of law as held by the Supreme Court of the State of Illinois" but with a view to ascertaining whether "the events of the trial for which redress was denied in the Supreme Court of Illinois constituted a denial of their right to not have their liberty taken from them except by due process of law."

It is their position that the record reflects such dereliction or recreancy on the part of the counsel whom the court appointed for them as will assimilate this case to those cases in which this court has said that ostensible representation by counsel was nothing more than a sham; and that therefore due process has been denied.

Unfortunately for petitioners, the record does not support their counsel's statements as to the facts. He states on page 4 of his petition, that "The Appointed Attorney sat mute" and permitted verbal allusion to be made, without objection, to money unlawfully seized when the bills themselves had been suppressed on a pre-trial motion. But the record contradicts petitioners' counsel. The full substance of the testimony *and of counsel's objection thereto* (which objection present counsel says was not made), is as follows (Tr. pp. 21-22):

> "My name is Loran Travelstead, a Deputy Sheriff of Saline County since December 7, 1942. I know Archie Finch and Nancy Finch, and was one of the investigators of this larceny at Carrier Mills. I arrested Archie and Nancy Finch and placed them in jail. Two police from Carrier Mills were with me.
>
> Q. Did you discover any money in the home of Archie and Nancy Finch?

A. Yes, sir.

Mr. Boswell: Object and ask again the exclusion of the Jury for the reasons that I have heretofore stated.

The Court: Overruled, the question is of what he found.

Mr. Boswell: You mean by an illegal search?

(Jury is excused out of hearing of the Court.)

The Court: Your motion at the beginning of the case was to suppress the actual production of the money.

Mr. Boswell: And also at that same time we asked that it be returned to us. The suppression of the amount and the kind they got because they never gave a description of it to us. It should have been given us, a description of the amount, the kind, and returned to us because it was gotten under illegal search and seizure, and you told me and the Court in the beginning.

The Court: There is no production of it yet. Hear it out of hearing of the jury."

Thus it appears that the court was apprised that the defendants contended not only that the money itself was inadmissible but that testimonial advertence might not be made to the fact of finding such money.

Petitioners' present counsel also says that petitioners' trial counsel was drunk at the time of the trial. But this fact does not appear in the record and petitioners' present counsel admitted as much in his petition for rehearing in the Supreme Court of Illinois. In his petition for rehearing (Tr. p. 75), petitioners' counsel says:

> "The facts in this case are that the Appointed Attorney was drinking intoxicants all during the more than two day trial and this culminated at the time the verdict was returned in the Trial Court ordering the Appointed Attorney physically removed from the Court by the Sheriff and confined in the County Jail.
> * * *

> "When the Counsel presently appearing for Plaintiffs in Error began to prepare the record for this Court it was then too late to have the record show the true state of facts. * * *"

In the Argument, authorities are cited recognizing that in Illinois, as in courts of appellate review in virtually every other Anglo-American jurisdiction, on writs of error or appeal, only those errors will be considered that appear upon the record, including, of course, any duly approved bill of exceptions.

Petitioners' contention that their counsel himself elicited testimony to which he had objected on the ground that it was a confession and was not admissible without proof in the absence of the jury of its voluntary character is inconsistent with petitioners' contention that the statements in question were not confessions at all but exculpatory in tenor. In the Argument, it is shown that in Illinois a statement exculpatory in tenor may be admitted without proof that it is voluntary even though its effect is to contradict other statements of the defendant and thus its actual tendency is incriminatory rather than exculpatory. No suggestion is made that this rule *per se* denies due process.

Petitioners object that counsel was remiss in his duties because although he had procured a stipulation that absent witnesses named Willie Bevins and Ollie McClure would have testified to the matters set forth in an affidavit filed in support of a motion for a continuance, he did not use this affidavit in behalf of his clients on the trial.

It is contended in the Argument that it is obvious that while propounding the affidavit in the hope that the prosecution would not stipulate to its being read and that

therefore the defendants would receive a continuance might have been a reasonable stratagem, actual use of the affidavit would have done the defendants no good; for it would have been used only to impeach or discredit Guy Turner, from whom the money was stolen, by showing that he had been drinking heavily; and it does not appear that it cannot be presumed that the actual reading of this affidavit would have helped the petitioners. For aught that a court of review can say, the witnesses may have been of such unsavory repute in the community or of such discreditable countenance otherwise that it was wise to use an affidavit as to what they would say in the hope of getting a continuance when it would be very unwise actually to read the affidavit to a jury. Nor is there any suggestion that counsel did not have other reasons, perhaps discovered after he had made the motion for a continuance and procured a stipulation, for not using this affidavit.

QUESTION PRESENTED.

Is there manifest upon the record in its entirety conduct on the part of petitioners' trial counsel so remiss as to amount to a denial of due process of law?

ARGUMENT.

I.

The contention that petitioners' counsel on the trial was so intoxicated that he could not adequately represent petitioners is not based upon matter in the record.

In respondent's Statement of the Case, *ante,* we called the court's attention to the confession of petitioners' present counsel, explicit in his petition for rehearing, that the alleged fact that petitioner's counsel was so intoxicated that he could not fairly represent his clients was not based upon the record.

In the Supreme Court of Illinois, as in nearly every other court of review, on writ of error or appeal, only such matter can be considered as appears in the record.*

Is, as petitioners contend, the trial court suffered petitioners' rights to be abandoned by a drunken lawyer and if that fact could not be made to appear by a transcript of the record, that fact could be made to appear to another judge by application for a writ of *habeas corpus* (not *coram nobis*), since presumably it could be matter within the trial court's knowledge.

In *Moore* v. *Dempsey,* 261 U.S. 86, this court held federal *habeas corpus* appropriate in a case where the matter al-

* The case of *Carter* v. *Illinois,* this court's present calendar No. 36, involves contentions interpolated by an indigent prisoner upon a common law record reviewed by the Supreme Court of Illinois on writ of error. In that case the Illinois practice is fully considered. Because counsel for petitioners in the instant case is presumably not aware that that case is now pending, the Attorney General will supply them with a copy of respondent's brief in the *Carter* case in order that, should he have occasion to file any further brief or other presentation in this court, he will be apprised that contentions pertinent to the instant case are now before the court in the *Carter* case.

leged as vitiating the trial was *dehors* the record, although it had denied *certiorari* to review a judgment of the Supreme Court of Arkansas affirming petitioner's conviction.

II.

Petitioners' other complaints are either not supported by the record or do not constitute denial of due process.

In respondent's Statement of the Case, *ante,* we demonstrated petitioners' present counsel's statement is not supported by the record in his statement that counsel on the trial acquiesced in verbal allusion to the finding of money on an illegal search, after the money itself, as physical evidence, had been suppressed by a pre-trial order. Therefore nothing more need be said in response to this contention.

Whether petitioners' counsel should put his clients on the stand and whether he should read to the jury an affidavit as to the testimony which absent witnesses would give were matters requiring professional discretion. Every lawyer experienced in the trial of criminal cases knows that there is frequently no problem of judgment more difficult of solution than that of whether to put an accused witness upon the stand, thereby exposing him to cross-examination and impeachment, or whether to allow him to remain mute. Nor is it an easy task to say whether the testimony of a witness, whether the witness be present or whether a substitute for his testimony be available in the form of an affidavit, should actually be used or not. Particularly in a small community, where prospective witnesses are known, it may be very bad judgment indeed to call such witnesses, even though their absence has been used in a vain effort to procure a continuance.

We earnestly emphasize the following consideration: If cases are to be reversed years later because defense counsel did not call a witness who presumably was available, a new and dangerous means of freeing desperate criminals has been invented. It is true that in *habeas corpus* or *coram nobis* the trial court may determine not only whether the witness was available, but whether failure to call him constituted such an abdication of counsel's responsibility as to deny due process. But petitioners would have this court declare categorically, upon a naked record that gives and can give none of the circumstances which may have prevailed upon defense counsel to forbear reading the affidavit, that such forbearance was an abandonment of his clients and worked a denial of due process.

Petitioners' present counsel also says that petitioners' trial counsel deprived them of due process when he himself elicited statements made by his clients that, according to petitioners' present counsel, should have been excluded as "confessions" unless a preliminary hearing outside the presence of the jury showed them to have been voluntarily made. But petitioner's counsel also contends that the statements did not amount to confessions because they did not show petitioners to be guilty of larceny. The fact is that they were exculpatory in intent and tenor, if not exculpatory in effect. The wisdom of eliciting them was a matter for the judgment of counsel.

In Illinois the rule is that, although confessions must be shown *prima facie* by proof outside the jury to have been voluntarily made statements made with exculpatory intent may be shown without such preliminary proof, even though the effect of such statements is actually to incriminate the accused (*People* v. *Wynekoop*, 359 Ill. 124).

The very fact that the State's attorney did not put these statements in evidence raises a strong inference that they

were favorable to the accused. But even if it should be conceded that petitioners' trial counsel was guilty of a serious mistake in judgment, that would not in itself deny due process. Finally, it must be remembered that Illinois observes the rule that cases will not be reversed where the proof of guilt is clear, even though error may have intervened at the trial. In the instant case, petitioners did not deny their guilt and the evidence showed them to have been in possession of the spoils of a larceny shortly after it occurred.

We submit that it was for the courts of Illinois, not for this court, to say whether the errors complained of were reversible; and that no question of the denial of federal due process is raised in the instant case.

Conclusion.

For the reasons urged in this brief, it is respectfully submitted that this court's writ of *certiorari* should be denied.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.